ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 18-1128, *et al.* (consolidated)

DELAWARE RIVERKEEPER NETWORK, *ET AL.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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March 21, 2019

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

The parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Petitioners' Opening Briefs.

B. Rulings Under Review:

1. *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 (2018) ("Certificate Order"), R.10769, JA ___; and

2. *PennEast Pipeline Company, LLC*, 164 FERC ¶ 61,098 (2018) ("Rehearing Order"), R.11024, JA ___.

C. Related Cases:

Petitioner Homeowners Against Land Taking – PennEast, Inc. filed a petition for review (No. 18-1079) of the Commission's Certificate Order while requests for rehearing were still pending before the Commission. On August 14, 2018, this Court dismissed that petition as incurably premature.

Delaware Riverkeeper Network petitioned for a writ of mandamus (No. 18-1127) on May 9, 2018. In response to Delaware Riverkeeper Network's withdrawal (after the Commission issued its Rehearing Order), this Court dismissed that petition on September 5, 2018.

In *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 109-13 (D.C. Cir. 2018), this Court affirmed the district court's dismissal of a complaint filed by

Petitioner Delaware Riverkeeper Network that alleged that FERC's funding structure and processing of pipeline certificate applications—in particular, the PennEast pipeline application—violated due process. PennEast Pipeline Company intervened in that appeal and in the district court proceeding. *Id*. at 106.

Counsel for Respondent is not aware of any other related cases.

/s/ Anand R. Viswanathan
Anand R. Viswanathan
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GLOSSARY

Br.	Petitioners' Joint Opening Briefs
Certificate Order	*PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 (2018), R.10769, JA ___
Commission or FERC	Federal Energy Regulatory Commission
Environmental Impact Statement or EIS	Environmental Impact Statement for the PennEast Project, issued April 2017
Environmental Petitioners	Petitioners Delaware Riverkeeper Network, New Jersey Conservation Foundation and the Watershed Institute, Hopewell Township, and Homeowners Against Land Taking – PennEast, Inc.
Envtl. Br.	Brief of Petitioners Delaware Riverkeeper Network, New Jersey Conservation Foundation and the Watershed Institute, Hopewell Township, and Homeowners Against Land Taking – PennEast, Inc.
Envtl. Defense Fund Amic. Br.	Brief of amicus curiae Environmental Defense Fund in support of Petitioners
Inst. for Policy Integrity Amic. Br.	Brief of amicus curiae Institute for Policy Integrity in support of Petitioners
NEPA	National Environmental Policy Act
New Jersey	Petitioners New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of Rate Counsel
N.J. Br.	Brief of Petitioners New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of Rate Counsel

Niskanen Amic. Br.	Brief of amicus curiae Niskanen Center in support of Petitioners
PennEast	PennEast Pipeline Company, LLC
Policy Statement of 1999 Policy Statement	*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000)
Project	PennEast Pipeline Company Project
Rehearing Order	*PennEast Pipeline Company, LLC*, 164 FERC ¶ 61,098 (2018), R.11024, JA ___

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ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

Statement of the Issues

In this proceeding, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a certificate of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to PennEast Pipeline Company, LLC ("PennEast"). That certificate conditionally authorized PennEast to construct and operate a new 116-mile-long natural gas pipeline, along with related facilities, in Pennsylvania and New Jersey. *See PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 ("Certificate Order"), JA ___, *on reh'g*, 164 FERC ¶ 61,098 (2018) ("Rehearing Order"), JA ___.

PennEast's proposed project ("Project") would provide additional transportation capacity from Pennsylvania to New Jersey and enhance the pipeline grid by connecting sources of natural gas to markets in the northeast region and making reliable natural gas service available to end users. Approximately 90 percent of the new capacity is subscribed under long-term contracts (precedent agreements) with shippers.

In its Environmental Impact Statement, the Commission determined that the Project may result in some adverse environmental impacts on specific resources. Many if not most would be temporary or short-term. Others would be reduced to less-than-significant levels by the implementation of appropriate mitigation measures. The Commission ultimately determined that the Project would serve the public interest, based on the agency's balancing of the evidence of public benefits against the potential adverse economic effects of the Project and findings on environmental impacts.

In two separate opening briefs, Petitioners New Jersey Department of Environmental Protection, Delaware and Raritan Canal Commission, and New Jersey Division of Rate Counsel (collectively "New Jersey"), and Petitioners Delaware Riverkeeper Network, New Jersey Conservation Foundation and the Watershed Institute, Hopewell Township, and Homeowners Against Land Taking –

PennEast, Inc. (collectively "Environmental Petitioners"), raise the following issues:

(1) Whether the Commission reasonably issued the certificate of public convenience and necessity, conditionally authorizing construction and operation of the PennEast Project, based on:

a. **public benefit**, where the Project is 90 percent subscribed under binding, long-term contracts (some with PennEast affiliates) that demonstrate market need;

b. **initial recourse rates**, calculated with a return on equity of 14 percent and a capital structure of 50 percent debt and 50 percent equity, consistent with initial rates adopted for similarly-situated new companies constructing new major pipelines; and

c. **environmental review**, and assessment of appropriate mitigation and alternatives, in the Environmental Impact Statement and the Commission's orders, of impacts on greenhouse gas emissions, water resources, protected species, and cultural resources; and

(2) Whether PennEast may properly exercise eminent domain authority, upon issuance of the FERC certificate, under the Natural Gas Act and the Takings Clause of the Fifth Amendment.

Statement Regarding Jurisdiction

Before the Commission issued the August 10, 2018 Rehearing Order, several parties filed petitions with this Court seeking review of the non-final Certificate Order; one of those petitions also sought review of two FERC "tolling orders." *See* No. 18-1128 (pet. filed May 9, 2018 by Del. Riverkeeper Network); No. 18-1144 (pet. filed May 21, 2018 by N.J. Dep't of Envtl. Protection and Del. and Raritan Canal Comm'n). The Commission moved to dismiss these petitions as incurably premature on May 29, 2018. PennEast also moved to dismiss for lack of jurisdiction.

This Court, by order dated August 15, 2018, referred the motions to dismiss to the merits panel and directed the parties to address in their merits briefs the issues presented in the motions.

The Commission's motion to dismiss the first two petitions for review (18-1128 and 18-1144) for lack of jurisdiction was consistent with statutory requirements for judicial review and with this Court's precedent. Both petitions were filed while the agency was still considering requests for rehearing of the Certificate Order, i.e., before the agency's action became final. *See, e.g.*, 15 U.S.C. § 717r(b) (judicial review of final agency action by an "aggrieved" party); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002) (request for administrative reconsideration renders an agency's action non-final as to requesting

party, and subsequent agency action cannot secure appellate jurisdiction); *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 238 (D.C. Cir. 1980). This Court routinely dismisses petitions filed while agency rehearing is pending as incurably premature. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 57-58 (D.C. Cir. 2015); *Clifton Power*, 294 F.3d at 111.

Because the later petitions for review (of both the Certificate Order and the Rehearing Order), Nos. 18-1220, 18-1225, 18-1226, 18-1233, and 18-1256, were filed after final agency action in this proceeding, dismissal of Nos. 18-1128 and 18-1144 will have no practical effect on the issues presented for this Court's review. The Commission notes, however, that petitions for review of non-final FERC orders (filed with increased frequency in recent years) both ignore the requirements of the Natural Gas Act and waste the limited resources of courts and the agency.

Statutory and Regulatory Provisions

Pertinent statutes and regulations are in the separate Addendum.

Statement of Facts

I. Statutory and regulatory background

A. Natural Gas Act

The Natural Gas Act is designed "'to encourage the orderly development of plentiful supplies of … natural gas at reasonable prices.'" *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). To that end, sections 1(b) and (c) grant the Commission jurisdiction

over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b), (c). Before a company may construct a natural gas pipeline, it must obtain from the Commission a "certificate of public convenience and necessity" under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), and "comply with all other federal, state, and local regulations not preempted" by the Act. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013).

Under Natural Gas Act section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The Act empowers the Commission to "attach to the issuance of the certificate … such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

B. National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity triggers the National Environmental Policy Act ("NEPA"). *See* 42 U.S.C. §§ 4321, *et seq.* NEPA sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to

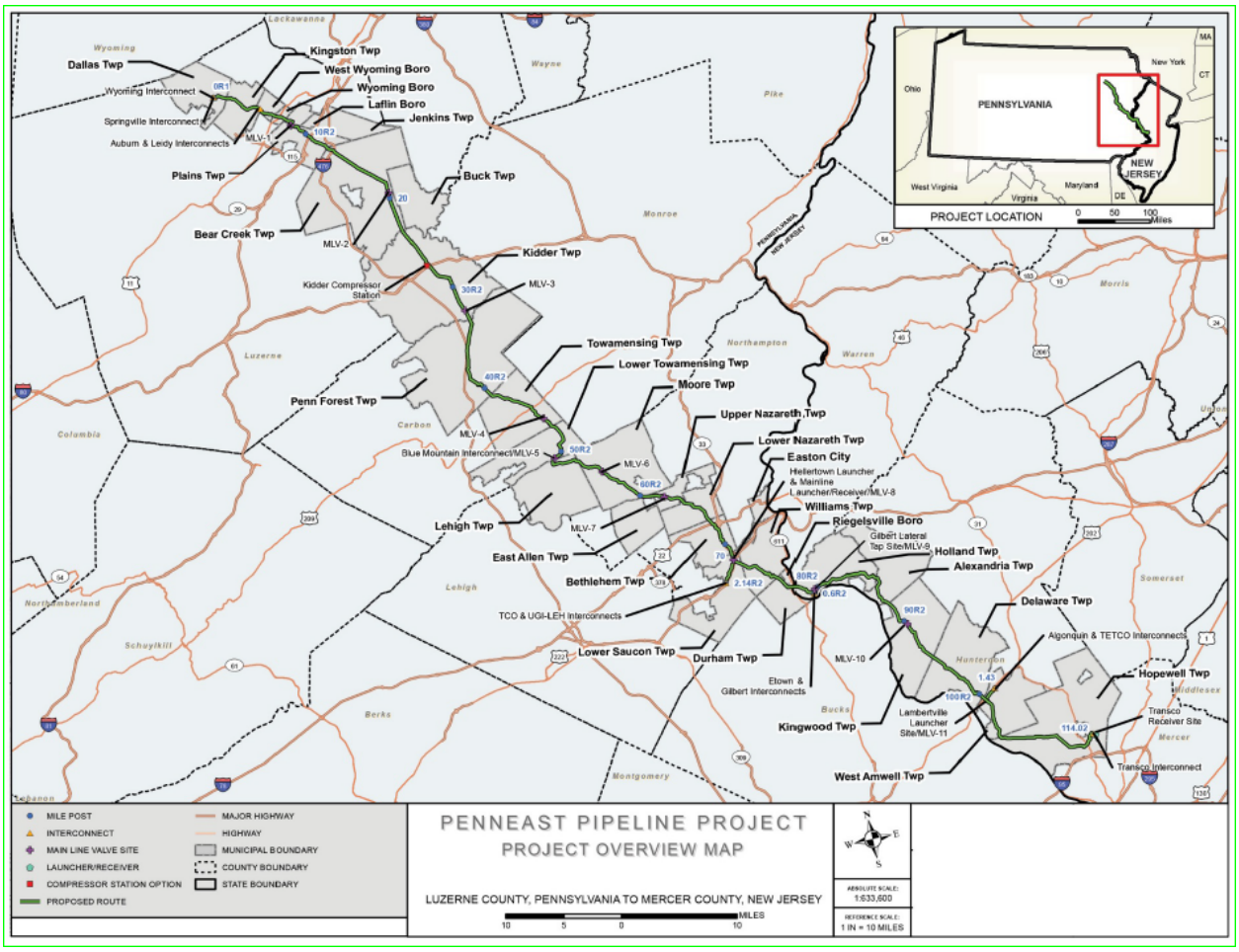
undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004). Accordingly, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

NEPA's implementing regulations require agencies to consider the environmental effects of a proposed action by preparing either an Environmental Assessment, if supported by a finding of no significant impact, or a more comprehensive Environmental Impact Statement. *See* 40 C.F.R. § 1501.4.

II. Commission review of the Project

A. Environmental review

The Project is intended to provide up to approximately 1.1 million dekatherms per day of firm transportation from Pennsylvania to New Jersey. Certificate Order P 1, JA ___. It will serve natural gas demand in Pennsylvania, New Jersey, and surrounding states by connecting sources of natural gas to markets in those areas. *See id*. P 4, JA ___. PennEast executed long-term contracts ("precedent agreements") for approximately 90 percent of the Project's capacity. *Id*. P 6, JA ___.



EIS at 1-2, JA ___.

The Commission's pre-filing review of the Project began in January 2015 when Commission staff issued a notice of intent to prepare an Environmental Impact Statement; this notice was published in the Federal Register in February 2015. Certificate Order P 93, JA ___. The notice was mailed to over 4,300 entities, including federal, state, and local government representatives and agencies; elected officials; regional environmental groups and non-governmental organizations; Native American tribes; potentially affected property owners; other interested entities; and local libraries and newspapers. *Id*. The notice invited

written comments on environmental issues and listed the date and location of five public scoping meetings. *Id*. In response, the Commission received over 6,000 comment letters, and 250 people presented oral comments at public scoping meetings. *Id*.

Commission staff issued a draft Environmental Impact Statement in July 2016, which addressed the issues raised during the scoping period. *Id*. P 94, JA ___. Subsequently, Commission staff held six public comment sessions, where 420 speakers provided oral comments. *Id*. P 95, JA ___. The Commission received 4,169 written comments in response to the draft Environmental Impact Statement. *Id*. To address environmental and engineering concerns, PennEast filed 33 modifications, over 21 miles in length, to the Project route; FERC staff invited comments from the public on those modifications and received over 400 comments. *Id*. PP 96, 102, JA ___, ___.

Commission staff issued the final Environmental Impact Statement in April 2017, which addressed all comments received on the draft Environmental Impact Statement. *Id*. P 97, JA ___. The final Environmental Impact Statement, like the draft, was widely distributed to the Commission's environmental mailing list and others. *Id*. The Environmental Impact Statement addressed geology; water resources; vegetation and wildlife; threatened, endangered, and other special status species; land use, recreational areas, and visual resources; socioeconomic issues;

cultural resources; air quality and noise impacts; safety; cumulative impacts; and alternatives. *Id*. The Environmental Impact Statement concluded that construction and operation of the Project will result in some adverse environmental impacts, but the proposed mitigation measures and staff's recommended environmental conditions would reduce those impacts to less-than-significant levels. *Id*. P 98, JA ___.

B. Certificate Order

On January 19, 2018, the Commission issued a conditional certificate of public convenience and necessity to PennEast. Certificate Order P 2, JA ___. (One Commissioner dissented on certain issues; two other Commissioners issued concurring statements.) The Commission applied the criteria set forth in its Policy Statement[1] to determine whether there is a need for the pipeline and whether it would serve the public interest. *Id.* PP 16-17, JA ___. The Commission found a market need for the Project, as evidenced by precedent agreements for 90 percent of the pipeline's capacity. *Id.* PP 28-30, 36, JA ___-__, ___. It also accepted PennEast's proposed initial rate, including a return on equity of 14 percent, but

[1] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) ("Policy Statement"). The Commission recently issued a Notice of Inquiry regarding potential revisions to its approach under the currently effective Certificate Policy Statement. *Certification of New Interstate Natural Gas Facilities,* 163 FERC ¶ 61,042 (2018).

required that PennEast reduce the equity component of its capitalization to 50 percent, consistent with Commission policy and the risks facing new companies constructing major new pipelines. *Id*. PP 58-59, 61, JA ___-__.

As for environmental review of the Project, the Commission noted that the administrative record reflected incomplete surveys of the proposed route due to PennEast's lack of access to certain landowner property. *See id*. P 98, JA ___. In light of those incomplete surveys, the Commission imposed several environmental conditions that obligated PennEast to file additional information for the Commission's review and approval after the Pipeline obtained survey access—including "site-specific plans, survey results, documentation of consultations with agencies, and additional mitigation measures." *Id*. P 99, JA ___. The Commission found these additional requirements both ensured that the Environmental Impact Statement's analyses and conclusions "are verified based on the best available data," and would provide FERC staff with site-specific details needed to appropriately evaluate PennEast's compliance during construction. *Id*.

Notwithstanding the incomplete surveys, the Commission explained that the Certificate Order's affirmance of the Environmental Impact Statement was based on a substantial factual record, including PennEast's submissions, information developed through FERC staff's data requests, field investigations, the scoping process, contacts with federal, state, and local agencies, and other research and

analyses. *See id*. P 98, JA ___. The Certificate Order also contained specific mitigation measures developed by FERC staff that the Commission found would reasonably reduce the environmental impacts resulting from the Project's construction and operation. *Id*. It also required that PennEast file documentation—before starting construction—that it has received all applicable authorizations required under federal law. *Id*. P 99, JA ___.

Based on the Environmental Impact Statement and the full record in the proceeding, the Commission found that the Project, if constructed and operated as described in the Environmental Impact Statement, is an environmentally acceptable action. *Id*. P 217, JA ___. With appropriate environmental conditions and mitigation measures, the Project, in the Commission's determination, satisfies the Natural Gas Act's "public convenience and necessity" standard. *Id*.

C. Rehearing Order

In the Rehearing Order, the Commission denied or dismissed all requests for rehearing. Rehearing Order P 4, JA ___. (One Commissioner concurred in part and dissented in part, another dissented altogether.) As relevant here, the Commission rejected arguments that it: erred in finding a need for the Project (*id*. PP 14-23, JA ___-___); erred in approving a 14 percent return on equity for initial recourse rates (*id*. PP 34-37, JA ___-___); violated the Natural Gas Act and the Fifth Amendment by granting PennEast eminent domain authority (*id*. PP 28-33,

JA ___-___); and violated National Environmental Policy Act by relying upon incomplete or inaccurate information in the Environmental Impact Statement (*id*. PP 40-51, JA ___-___). The Commission also rejected arguments that its environmental analysis inadequately addressed alternatives to the pipeline (*id*. PP 80-90, 97-101, JA ___-___, ___-___) and impacts of upstream natural gas production, including the Project's greenhouse gas emissions (*id*. PP 112-23, JA ___-___).

Summary of Argument

In the Natural Gas Act, Congress entrusted the Commission with broad power to balance many competing interests and determine whether a natural gas certificate application is in the "public convenience and necessity." Here, consistent with agency policy and court precedent, the Commission reasonably found that the PennEast Project, if constructed and operated in accord with numerous mitigation measures, will advance the public interest.

There is a market need for the Project as demonstrated by long-term contracts for 90 percent of pipeline capacity. That some of the contracts are with PennEast affiliates does not render this finding arbitrary and capricious. The Commission reasonably concluded that affiliates would not enter into long-term binding contracts without a legitimate business need. The Project will also permit natural gas producers to access additional markets and benefit end users by

improving grid reliability. As for initial rates for the Project, the Commission reasonably found that PennEast's proposed return on equity reflected the risk to new companies of building major new pipelines and was commensurate with returns for similarly-situated companies.

Environmental Petitioners' contentions that the Commission violated the Natural Gas Act and the U.S. Constitution by permitting PennEast to exercise eminent domain authority have no merit. The Commission reasonably determined that it has authority under the Natural Gas Act to approve projects contingent upon the applicant obtaining other necessary authorizations. The courts of appeals, including this Court, have consistently upheld the issuance of such conditional FERC certificates.

The Natural Gas Act explicitly conveys eminent domain authority upon the Commission's issuance of a pipeline certificate, but the Commission here allowed no construction until PennEast satisfied the conditions the Commission imposed in the Certificate Order. And the Commission's public convenience and necessity finding was not based on PennEast having all necessary permits—a necessary pre-condition to construction—but on its determination that the Project's benefits outweigh its adverse effects. That finding satisfies the Takings Clause's public-use requirement, as well as all due process considerations.

The Commission's informed and reasoned determination that the Project is an environmentally acceptable action fully complied with NEPA. The Commission considered greenhouse gas emissions, and reasonably concluded that environmental effects from natural gas production are generally neither caused by a proposed infrastructure project nor reasonably foreseeable consequences of a project's approval. The Environmental Impact Statement also fully identified, described, and analyzed the Project's potential impacts on, as relevant here, water resources, protected species, and cultural attachment; it considered alternative routes and recommended appropriate mitigation measures to address identified adverse impacts. With potential adverse impacts effectively mitigated to the greatest extent practicable, the Commission was justified in concluding, after balancing pipeline benefits and impacts, that the Project advances the public interest.

Argument

I. Standard of review

The Court reviews Commission actions under the Administrative Procedure Act's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Rather, the court must uphold the

Commission's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.* (internal quotations omitted). Because the grant or denial of a Natural Gas Act section 7 certificate is within the Commission's discretion, the Court does not substitute its judgment for that of the Commission. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). The Court evaluates only whether the Commission considered relevant factors and whether there was a clear error of judgment. *Id*.

The arbitrary and capricious standard also applies to NEPA challenges. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). "[T]he court's role is 'simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98).

Agency actions taken under NEPA are entitled to a high degree of respect. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989). This Court evaluates agency compliance with NEPA under a "rule of reason" standard, *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014), and has consistently declined to "flyspeck" the Commission's

environmental analysis, *City of Boston Delegation v. FERC*, 897 F.3d 241, 251 (D.C. Cir. 2018). "[A]s long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (internal quotations omitted).

II. The Commission reasonably found the Project to be required by the "public convenience and necessity."

Section 7(e) of the Natural Gas Act grants the Commission broad authority to determine whether a proposed natural gas facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e); *see FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961) (Commission is "the guardian of the public interest," entrusted "with a wide range of discretionary authority") (internal quotations omitted); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (Commission "vested with wide discretion to balance competing equities against the backdrop of the public interest").

The Commission's "public convenience and necessity" analysis under 15 U.S.C. § 717f(e) has two components. *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017). First, the applicant must show that the project will "stand on its own financially because it meets a market need." *Id*. (internal quotations omitted). Second, if FERC finds market need, it will then proceed "to balance the

benefits and harms of the project, and will grant the certificate if the former outweigh the latter." *Id*.

A. The Commission reasonably found market need for the Project based on precedent agreements.

The Commission reasonably determined that PennEast's long-term contracts for approximately 90 percent of the Project's capacity demonstrated a market need for the Project. Certificate Order P 28, JA ___. It explained its policy to examine the merits of individual projects, and found that the precedent agreements here represented better evidence of demand than other evidence that New Jersey proposed. *See, e.g.*, *id*. P 29 (noting uncertainty associated with long-term demand projections, which are often variable and influenced by a variety of factors), JA ___; Rehearing Order P 20 (same), JA ___.

New Jersey contends that the Commission's 1999 Policy Statement concluded that precedent agreements are "'not a sufficient indicator by itself of the need for a project.'" Br. 16 (quoting Policy Statement, 88 FERC ¶ 61,227, at p. 61,744). That quote, however, was from a section that summarized pre-1999 policy, and was not a statement on the new policy. *See* Policy Statement, 88 FERC ¶ 61,227, at p. 61,744.

In fact, as the Commission explained here, the Policy Statement "made clear that, although companies are no longer required to submit precedent agreements for Commission review, *these agreements are still significant evidence of project*

need or demand." Rehearing Order P 16 (emphasis added), JA ___; *see also* Certificate Order P 27 (same), JA ___; Policy Statement, 88 FERC ¶ 61,227, at p. 61,748 (precedent agreements, though no longer required, "constitute significant evidence of demand for the project"); *Minisink*, 762 F.3d at 111 n.10 ("[T]he policy statement specifically recognizes that such agreements 'always will be important evidence of demand for a project.'") (quoting Policy Statement, 88 FERC ¶ 61,227, at p. 61,748). While the Policy Statement broadened the types of evidence an applicant may submit to show a project's public benefits, it did not compel any additional showing beyond precedent agreements. *See* Certificate Order P 27, JA ___.

Notwithstanding New Jersey's opinion on what constitutes Commission policy, Br. 16, 18-19, the Commission emphatically declared in the orders on review that under its current policy it does not look behind precedent agreements to make judgments about the needs of individual shippers. Rehearing Order P 16, JA ___; *see also, e.g.*, *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (noting the Court's traditional deference to the Commission on the agency's interpretations of its own statements).

This Court also has recognized that nothing in the Policy Statement "requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with

shippers." *Minisink*, 762 F.3d at 111 n.10; *see also* Certificate Order P 27, JA ___; *Sierra Club*, 867 F.3d at 1379 (affirming Commission reliance on preconstruction contracts for 93 percent of project capacity to demonstrate market need); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) ("As numerous courts have reiterated, FERC need not 'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'") (quoting *Myersville*, 783 F.3d at 1311).

Contracts with pipeline affiliates may serve as evidence of market need. *See* Rehearing Order P 16 & n.32, JA ___-__; Certificate Order P 33 & n.45, JA ___-__. Indeed, the 1999 Policy Statement focused less on whether the contracts are with affiliated or unaffiliated shippers, and more on the balancing of a project's impacts with its benefits. *See* Rehearing Order P 16 & n.32, JA ___-__; *see also* Policy Statement, 88 FERC ¶ 61,227, at pp. 61,748-49 (noting that the elimination of "a specific contract requirement reduces the significance of whether the contracts are with affiliated or unaffiliated shippers").

The Commission's primary concern regarding affiliate agreements—i.e., preventing undue discrimination against non-affiliated shippers—is one that no party raised in the proceeding at issue here. *See* Rehearing Order P 17, JA ___; Certificate Order P 33, JA ___; *see also* Rehearing Order P 17 n.42 (noting Commission regulations requiring PennEast "to treat all customers, whether

affiliated or non-affiliated, on a non-discriminatory basis"), JA ___. Moreover, PennEast held an open season for capacity on the Project, during which "all potential shippers had an opportunity to contract for service." Rehearing Order P 17, JA ___; *see also* Envtl. Defense Fund Amic. Br. 7-8 (acknowledging that precedent agreements "may constitute substantial evidence of need in many cases, particularly where the pipeline conducted an open solicitation for pipeline customers").

New Jersey instead suggests, at most, that pipeline affiliates have business incentives to contract with the pipeline even in the absence of market need. *See* Br. 19-20. The Commission found, however, that affiliation with a project sponsor does not lessen a shipper's need for new capacity and its contractual obligation to pay for such service. Rehearing Order P 17, JA ___. Quite the opposite: contracts with shippers entail "substantial financial commitment" and thus represent the best evidence that the Project would serve a market need. *See* Certificate Order P 28, JA ___; *see also id*. P 33 (noting that three of the six affiliates here, accounting for 38 percent of the total project capacity, are local distribution companies with service obligations to retail customers), JA ___.[2]

[2] Amicus curiae Environmental Defense Fund raises a new argument about the market risk of certain utility affiliates not regulated by FERC. Br. 18-23. Because no party raised this argument here, however, this Court should not consider it. *See, e.g.*, *CSX Transp., Inc. v. Surface Transp. Bd.*, 754 F.3d 1056,

Forcing the Commission to peek under the hood of these contracts would place a regulatory agency in the awkward position of second-guessing the "reasoned business decisions" of private entities. *See id.*; *see also Twp. of Bordentown*, 903 F.3d at 262 ("A contract for a pipeline's capacity is a useful indicator of need because it reflects a 'business decision' that such a need exists. If there were no objective market demand for the additional gas, no rational company would spend money to secure the excess capacity."); *Sierra Club*, 867 F.3d at 1379 (market-need criterion assesses "whether the pipelines will be self-supporting," and was satisfied by a showing that most of the pipelines' capacity had been contracted for).

The Commission thus prudently avoids distinguishing between precedent agreements in assessing market need, so long as the agreements are long-term and binding. Certificate Order P 33 n.45 (citing *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at P 57 (2002)), JA ___. Here, it reasonably found that the affiliate status of six of the twelve shippers "does not call into question their need for the new capacity or otherwise diminish the showing of market support." *Id.* P 33, JA ___. This Court earlier this year upheld the Commission's reliance on affiliate contracts, in another pipeline certificate case, against precisely the type of

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1064 (D.C. Cir. 2014); *Baptist Memorial Hosp.-Golden Triangle v. Sebelius*, 566 F.3d 226, 230 (D.C. Cir. 2009).

arguments New Jersey now makes. *See Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 at *1 (D.C. Cir. Feb. 19, 2019) (unpublished) (that contracts supporting market need are with corporate affiliates does not render FERC's decision to rely on these agreements arbitrary or capricious).

And because the Project rates were calculated based on design capacity, PennEast bears financial risk from unsubscribed capacity and thereby has a "powerful incentive" to ensure that demand supports the proposed project. *See* Rehearing Order PP 17-18, JA ___-__. The Certificate Order also required PennEast to confirm the legitimacy of all financial commitments (with both affiliates and non-affiliates) and thus the viability of the Project. *See id*. P 17 (noting requirement that PennEast file, before starting construction, a written statement affirming that it had executed contracts for service as provided for in the precedent agreements), JA ___.

New Jersey also claims that the Commission ignored other evidence (e.g., pipeline utilization rates) that purportedly demonstrated a lack of market need for the Project. *See* Br. 21-22. But, in fact, the Commission considered that evidence and explained why it did not find it persuasive—i.e., utilization rates, which reflect actual gas flows, "do not indicate whether there is available firm capacity on the pipelines." Certificate Order P 32, JA ___; *see also Myersville*, 783 F.3d at 1311 (affirming Commission's finding that a market study was unpersuasive because it

provided only general overviews of demand by sector and did not show a decline in demand in the markets that the proposed project was intended to serve). And the Environmental Impact Statement found insufficient firm capacity on existing pipelines to transport all the volumes of natural gas proposed by PennEast to the proposed range of delivery points. *See* Certificate Order PP 31-32, JA ___-__; Rehearing Order P 22, JA ___; EIS at ES-16 – ES-17, 3-4 – 3-8, JA ___-___, ___-___.

The Commission thus gave a reasonable explanation for why it disagreed with New Jersey's evidence for the claim that the region already had adequate alternative supplies of natural gas. *See* Br. 22-23. New Jersey's disagreement with these findings does not show a lack of reasoned decisionmaking. *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (courts should not disturb the Commission's judgment, "on which reasonable minds can differ," so long as the Commission has "engaged in reasoned decisionmaking"); *PJM Power Providers Group v. FERC*, 880 F.3d 559, 564 (D.C. Cir. 2018).

B. The Commission made additional findings on the Project's public benefits.

Both sets of petitioners argue that the Commission's benefits analysis rests entirely on precedent agreements and disregards other public benefits referenced in the Policy Statement. *See, e.g.*, N.J. Br. 15-16, 18; Envtl. Br. 2, 22-23. Not so. While the Commission reasonably relied on precedent agreements, it nevertheless

made other findings on the Project's public benefits. *See* Certificate Order PP 28, 30, JA ___-__; Rehearing Order PP 20-21 & n.48, JA ___-__.

The Commission found that the Project will connect sources of natural gas in the mid-Atlantic (Marcellus Shale) region to markets in Pennsylvania and New Jersey, and thereby enable upstream producers of natural gas to access additional markets and meet natural gas demand in those markets. *See* Certificate Order PP 28, 30, JA ___-__. The Commission also found that the Project will benefit consumers and end-users by developing gas infrastructure in the region, increasing access to low-cost domestic supply, and enhancing price stability and the reliability of the pipeline grid. *Id*.; Rehearing Order P 20 & n.48, JA ___-__; *see also* Policy Statement, 88 FERC ¶ 61,227, at p. 61,748 (discussing examples of public benefits).

III. The Commission reasonably approved PennEast's initial rates.

Under section 7 of the Natural Gas Act, 15 U.S.C. § 717f(e), FERC employs a "public interest" standard to determine the initial rates that a pipeline may charge for newly-certificated service; that standard is less exacting that the "just and reasonable" standard of Natural Gas Act sections 4 and 5, 15 U.S.C. §§ 717c, 717d. *See Atl. Ref. Co. v. Pub. Serv. Comm'n,* 360 U.S. 378, 390-91 (1959); *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1068, 1070 (D.C. Cir. 2003). The initial section 7 rates are "a temporary mechanism to protect the public interest

until the regular rate setting provisions of the [Act] come into play." *Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 583 (D.C. Cir. 2010) (internal quotation omitted). The delay inherent in determining just and reasonable rates under sections 4 and 5 makes that standard inappropriate for regulating initial rates under section 7. *Consumer Fed'n of Am. v. FPC*, 515 F.2d 347, 356 n.56 (D.C. Cir. 1975) (citing *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 227-28 (1965)).

While the Commission approved PennEast's proposed 14 percent return on equity, it required PennEast to lower the equity portion of its capital structure from 60 to 50 percent, which reduces the overall rate and treats PennEast the same as other new pipelines. Rehearing Order P 36, JA ___; *see also* Certificate Order P 58 (explaining FERC policy and noting that equity financing is typically more costly than debt financing and therefore more costly to ratepayers), JA __; *Sierra Club*, 867 F.3d at 1377 (affirming approval of 14 percent return on equity based on a 50-50 debt equity structure).

New Jersey argues the Commission approved the 14 percent return on equity based on its "reliance on precedent" rather than an analysis of current market conditions. Br. 39. To the contrary, the Commission's decision reflects the risk PennEast faces as a new market entrant to construct a new pipeline system and recover the capital invested in that project. Certificate Order P 59, JA ___;

Rehearing Order P 36, JA ___; *see also Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 56 (2018). This Court recently upheld the Commission's ratemaking treatment of new pipelines as reasonable. *Appalachian Voices*, No. 17-1271, 2019 WL 847199 at *1.

Approving equity returns of up to 14 percent with an equity capitalization of no more than 50 percent provides an appropriate incentive for new pipeline companies to enter the market; it also reflects that projects undertaken by new entrants face higher business risks than those undertaken by established pipelines with existing customers and financial relationships. Certificate Order P 59, JA ___; Rehearing Order P 36 (citing *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220 at P 127 (2006)), JA ___.

New entrants do not have an existing customer base or pipeline system to leverage and may be constructing more facilities than existing pipelines typically do in incremental expansion projects. Rehearing Order P 36, JA ___. Commission policy thus requires existing pipelines that provide incremental services through expansion to use the return on equity underlying their existing rates last approved in a Natural Gas Act section 4 rate case proceeding when designing the incremental rates. *Id*. This tends to yield a return below 14 percent, reflecting the lower risk. *Id*.

New Jersey contends that the Commission has not established PennEast's actual risk based on current market conditions in calculating the return on equity. Br. 38-39. But this proceeding only involved an initial rate to "hold the line" until just and reasonable rates can be determined. Rehearing Order P 37, JA ___. As a new pipeline company, PennEast's proposed initial rates are based on estimates of costs and revenues necessarily unsupported by any operating history. *Id*. Because actual costs associated with constructing the pipeline and providing service may increase or decrease, it is reasonable to review the initial rates once the pipeline has an operating history. Certificate Order P 62, JA ___.

To ensure this review, the Commission required PennEast to file a cost and revenue study after its first three years of actual operation. *Id*. The three-year report will allow the Commission and the public to review PennEast's estimates underlying its initial rates, to determine whether PennEast is over-recovering its cost of service and whether the Commission should establish just and reasonable rates under Natural Gas Act section 5, 15 U.S.C. § 717d. *Id*. Alternatively, PennEast may elect to make an earlier Natural Gas Act section 4 filing, under 15 U.S.C. § 717c, to revise its initial rates. *Id*. Accordingly, the Commission reasonably concluded that PennEast's initial rates will "'ensure that the consuming public may be protected'" until just and reasonable rates can be determined under

sections 4 and 5. Rehearing Order P 37 (internal quotation marks omitted), JA ___.

And while New Jersey references the low cost of debt, Br. 39 n.14, debt financing rates are not a proxy for the return on equity, and New Jersey makes no effort to demonstrate otherwise. *See Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 70 (2018). As for New Jersey's citation to Commission orders setting returns on equity lower than 14 percent, Br. 39, those cases involved *existing* pipelines in the context of full Natural Gas Act section 4 rate cases, not *new* pipelines applying for section 7 initial rates. *See El Paso Natural Gas Co.*, 145 FERC ¶ 61,040, at PP 1-3 (2013); *Portland Natural Gas Transmission Sys. Op.*, 142 FERC ¶ 61,197, at PP 1-3 (2013). The Commission's 14 percent return on equity for PennEast adheres to its policy for new pipelines in Natural Gas Act section 7 initial rate proceedings.

IV. The Commission's grant of eminent domain authority is consistent with the Natural Gas Act.

Environmental Petitioners claim the Certificate Order violates the Natural Gas Act because it authorizes eminent domain on a "preliminary" or conditional finding of public benefit and before PennEast has received all necessary approvals for the Project—even if the Project is in the public interest. *See* Br. 27-29; *see also id.* 30 (certificate was not "in force" under 15 U.S.C. § 717f(c)(1)(A) because "required federal authorizations have not been obtained").

But courts have consistently upheld the Commission's practice of issuing conditional certificates that are contingent on the applicant later receiving other authorizations or permits. *See, e.g.*, Rehearing Order P 63 & n.156 (citing cases), JA ___-__. This Court recently rejected a claim that a conditional certificate violated the Natural Gas Act, noting that 15 U.S.C. § 717f(e) "expressly provides" the Commission authority to attach reasonable terms and conditions to a certificate. *Appalachian Voices*, No. 17-1271, 2019 WL 847199 at *1.

And in *Delaware Riverkeeper Network v. FERC*, this Court found no violation of the Clean Water Act from the Commission issuing a conditional certificate before Pennsylvania issued a water quality certification under section 401 of the Clean Water Act, 33 U.S.C. § 1341. 857 F.3d 388, 399 (D.C. Cir. 2017); *see also Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 279 (D.C. Cir. 2015) (Rogers, J., dissenting in part and concurring in judgment) (adopted in *Del. Riverkeeper*, 857 F.3d at 399); *see also Twp. of Bordentown*, 903 F.3d at 246 (holding that "FERC's practice of issuing certificates that condition the start of construction on the receipt of the necessary state permits complies with the plain language of the [Clean Water Act]").[3] Similarly, in the Clean Air Act context, this

[3] Environmental Petitioners (at 30) mistakenly refer to this (PennEast pipeline) case as a "case of first impression"—disregarding altogether the 2017 *Delaware Riverkeeper* case brought by the first-named Environmental Petitioner here.

Court upheld FERC's approval of a natural gas project conditioned on the applicant later securing a state air-quality permit. *See Myersville*, 783 F.3d at 1320-21; *see also Town of Weymouth, Mass. v. FERC,* No. 17-1135, 2018 WL 6921213, at *3 (D.C. Cir. Dec. 27, 2018) (unpublished) (upholding FERC certificate conditioned on state issuance of Coastal Zone Management Act permit). These decisions necessarily foreclose Environmental Petitioners' claim that the Commission "must wait for states to decide whether to grant or deny a water quality certification before issuing a certificate authorizing eminent domain." Br. 33.

Multiple courts of appeals, including this Court, also have recognized that the Commission lacks authority to constrain a certificate-holder's statutory exercise of the eminent-domain right. *See, e.g.*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("Once a certificate has been granted," under 15 U.S.C. § 717f(h), the Commission "does not have the discretion to deny a certificate holder the power of eminent domain."); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018) (FERC's issuance of a certificate of public convenience "automatically transfers the power of eminent domain to the Certificate holder," and thus "FERC does not have discretion to withhold eminent domain once it grants a Certificate"); *Twp. of Bordentown*, 903 F.3d at 265 (Natural Gas Act "contains no condition precedent" to right of eminent

domain other than issuance of the certificate when holder is unable to acquire right-of-way by contract); *see also* Rehearing Order PP 30, 33, JA ___, ___.

The Commission reasonably interpreted 15 U.S.C. § 717f(h) as empowering a certificate-holder to immediately exercise the right of eminent domain in court, regardless of the status of other authorizations. *See* Rehearing Order PP 30, 33, JA ___, ___; *see also Del. Riverkeeper Network*, 857 F.3d at 397 ("Because the Certificate Order expressly conditioned FERC's approval of potential discharge activity on Transco first obtaining the requisite § 401 certification, and was not itself authorization of any potential discharge activity, the issuance of the Certificate Order before Pennsylvania's issuance of its § 401 certificate did not violate § 401 of the [Clean Water Act].").

15 U.S.C. § 717f(h) applies to "any holder of a certificate of public convenience and necessity." That provision leaves no room for the Commission to withhold or limit the certificate-holder's right to exercise eminent domain, upon finding that a proposed project serves the public interest. *See* Rehearing Order P 30 ("[A]fter issuing PennEast its certificate of public convenience and necessity, the Commission lacks the authority to limit its exercise of eminent domain."), JA ___; *accord id*. P 33, JA ___; *see also id*. P 29 ("Congress did not suggest that there was a further test," beyond the public convenience determination under 15

U.S.C. § 717f(e), before the certificate-holder can exercise eminent domain), JA ___; *Midcoast*, 198 F.3d at 973.

Nor does the Natural Gas Act support Environmental Petitioners' theory that the Commission must withhold a certificate until states act. *See, e.g.*, Br. 28-31, 33; *see also* Niskanen Amic. Br. 12-13 (FERC should have imposed conditions in certificate prohibiting eminent domain "until all the necessary authorizations are in place"). Congress directed that a certificate "shall be issued" to a qualified applicant so long as the proposed project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e).

Requiring the Commission to pause the exercise of eminent domain until states have exercised their own authority to approve the Project—by either withholding a certificate altogether or placing conditions in a certificate to limit eminent domain—would contravene congressional intent and potentially harm the public interest. *See* Envtl. Br. 28-31, 33; Niskanen Amic. Br. 12-13. Congress, in the Natural Gas Act, stated its view that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a); *see also* Rehearing Order P 29, JA ___. Allowing states with delegated federal authority to "indefinitely" freeze the federal administrative process until they choose to act would undermine federal regulation of pipeline construction, contrary to the view

of Congress as expressed in 15 U.S.C. § 717(a). *See* Rehearing Order P 56, JA ___.

And, as the Commission explained, delaying or conditioning the eminent-domain right to await other agency approvals would preclude companies from engaging in "sometimes lengthy" pre-construction activities. *Id*. This result could potentially harm consumers and the public by delaying new projects from delivering needed natural gas. *See id*. P 56, JA ___. The Commission thus reasonably described its approach as a practical response to the reality that "in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a natural gas project" before FERC issues a certificate "without unduly delaying the project." *Id*.

This Court recently highlighted the impact that state permitting delays can have on FERC's ability to regulate in the public interest. In *Hoopa Valley Tribe v. FERC*, the Court found that delay of water-quality certifications by several states allowed them to "usurp FERC's control over whether and when a federal license will issue," and thereby "undermine FERC's jurisdiction to regulate" federal licensing proceedings. 913 F.3d 1099, 1104 (D.C. Cir. 2019); *see also N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018) (rejecting state agency's claim, which would give states the ability to "indefinitely" request more information from applicants).

Hoopa Valley's concerns in the hydroelectric licensing context apply equally here—i.e., denying a certificate of public convenience because states have not yet acted would effectively give them veto power over FERC's authority under the Natural Gas Act to approve natural gas projects. *See* Rehearing Order P 56, JA ___; *see also Hoopa Valley*, 913 F.3d at 1104-05 ("This Court has repeatedly recognized that the [Clean Water Act's] waiver provision was created to prevent a State from indefinitely delaying a federal licensing proceeding." (internal quotations omitted)). That is both contrary to Congress's intent and far from a "reasonable" outcome, *see* Envtl. Br. 32.

In any event, there is no need to delay federal certification of such projects while states deliberate whether to grant water-quality certifications. As the Commission noted, authorizing eminent domain before other agencies act does not "impact any substantive determinations that need to be made by the states" under other federal statutes. Rehearing Order P 55, JA ___. The New Jersey and Pennsylvania state agencies that have certification authority under section 401 of the Clean Water Act "retain full authority to grant or deny the specific requests." *Id.*

Because New Jersey and Pennsylvania thus retain authority to act in their respective spheres, there is no merit to Environmental Petitioners' suggestion that the Commission illegally expanded its powers merely by not waiting for states to

act before issuing a certificate. *See* Br. 32-33. And while Environmental Petitioners caution that the Commission "cannot directly authorize construction" without a final decision by New Jersey on water quality, Br. 33, the Commission emphasized in the orders on review that "construction cannot commence before all necessary authorizations are obtained," Rehearing Order P 55 & n.136, JA ___-___; *see also id.* P 31 (PennEast "cannot cut vegetation or disturb ground pending receipt of any federal approvals"), JA ___; *id.* P 46 ("[N]o construction will be allowed to commence until PennEast submits outstanding survey information, and affirms that it has received all applicable authorizations required under federal law."), JA ___; Certificate Order Appendix A, Condition 10 (before commencing construction of "any project facilities," PennEast must submit "documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof)"), JA ___.

V. The orders on review are consistent with the Takings Clause.

A. The "public convenience and necessity" finding satisfies the Takings Clause's public-use showing.

Environmental Petitioners further claim that the Commission's practice of issuing conditional certificates violates the Takings Clause of the Fifth Amendment. *See, e.g.*, Br. 23 & n.6, 25-26. In their view, conditional certificates, as "preliminary" findings of public benefit, cannot form the basis for condemnation of private property. *See* Br. 25. But this ignores the Commission's

determination, consistent with this Court's precedent, that a "public convenience and necessity" finding under the Natural Gas Act satisfies the Takings Clause's public use requirement. *See* Rehearing Order P 29, JA ___; *Appalachian Voices*, No. 17-1271, 2019 WL 847199 at *2 ("FERC's rational public convenience and necessity determination satisfies the Fifth Amendment's 'public use' requirement."); *Midcoast*, 198 F.3d at 973.

The Commission has interpreted the public convenience and necessity determination (under 15 U.S.C. § 717f(e)) as requiring it to weigh the public benefit of a proposed project against the project's adverse effects. Rehearing Order P 30, JA ___. Once the Commission determines that the project serves the public convenience and necessity, the Natural Gas Act does not require it to make another, separate finding that the project serves a public use. *See id*. P 29, JA ___. This reasonable interpretation of a broadly-stated statutory provision is due deference. *See, e.g.*, *Del. Riverkeeper Network*, 857 F.3d at 395 (quoting *Myersville*, 783 F.3d at 1308).

The trio of Supreme Court decisions that Environmental Petitioners cite—*Kelo*, *Berman*, and *Midkiff*—does not help them. Those cases do not suggest (let alone hold) that a "public use" analysis must be final before any action is taken in an eminent domain proceeding. *See* Envtl. Br. 25-26. They confirm instead the more modest proposition that courts defer to legislative judgments on what may

serve a "public purpose" (defined broadly) that satisfies the Fifth Amendment. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) ("Without exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."); *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 241, 244 (1984) ("But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause . . . . [I]f a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use."); *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("The role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one.").

Just like in those cases, the legislature made a legislative judgment on a public purpose that satisfies the Takings Clause here: Congress, through the Natural Gas Act, concluded that transporting and selling natural gas for distribution to the public is in the public interest. *See* 15 U.S.C. § 717(a); Rehearing Order P 29, JA ___. Neither Congress nor any court has suggested that anything beyond the Commission's public convenience and necessity finding (under 15 U.S.C. § 717f(e)) is needed to trigger the eminent-domain right (under 15 U.S.C. § 717f(h)). *See, e.g.*, *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 110 (D.C.

Cir. 2018) ("Once FERC issues a certificate of public convenience and necessity, the pipeline company may acquire the necessary rights-of-way through eminent domain."); *Twp. of Bordentown*, 903 F.3d at 265 (15 U.S.C. § 717f(h) "affords certificate holders the right to condemn such property, and contains no condition precedent other than that a certificate is issued and that the certificate holder is unable to 'acquire [the right of way] by contract.'"); *see also* Rehearing Order P 29, JA ___. This Court should defer to Congress's judgment that a certificate of public convenience and necessity is sufficient to trigger the right of eminent domain under the Natural Gas Act and, accordingly, does not intrude on any Fifth Amendment rights.

Environmental Petitioners also claim that the Commission's reliance on precedent agreements violates the Fifth Amendment by failing to explore whether the project serves a public need. *See* Br. 21-24. But courts have consistently approved the Commission's use of precedent agreements to assess market need under the Natural Gas Act's public convenience standard. *See, e.g.*, *Appalachian Voices*, No. 17-1271, 2019 WL 847199 at *1; *Sierra Club*, 867 F.3d at 1379; *Minisink*, 762 F.3d at 111 n.10; *Twp. of Bordentown*, 903 F.3d at 263; Rehearing

Order P 16, JA ___.[4] And this Court has held that a public convenience and necessity finding under the Natural Gas Act also satisfies the Takings Clause's public use requirement. *See Appalachian Voices*, No. 17-1271, 2019 WL 847199 at *2; *Midcoast*, 198 F.3d at 973; *see also* Rehearing Order P 29, JA ___.

Amicus curiae Niskanen Center raises a new takings argument—i.e., that the certificate allows PennEast to take property along a route in New Jersey that may change and that may not be used for the pipeline. Amic. Br. 10-12.[5] But the alternative would leave pipelines like PennEast with a problem without a solution: landowners can refuse to grant property access for surveys and the pipeline would be unable to seek court intervention to obtain the survey-access that the landowners denied. This would present a major obstacle to the construction of new natural gas infrastructure projects and, as the Commission cautioned, would "allow protesting landowners to exercise veto power over such projects." *See* Rehearing Order P 44 n.112, JA ___; *see also id*. P 44 (noting that surveys were incomplete

[4] In any event, as described *supra* pp. 24-25, the Commission here did not rely "exclusively" on precedent agreements in finding that the Project served a public purpose.

[5] Again, because this amicus curiae brief raises new arguments not raised by any parties here, this Court should not consider them. *See supra* n.2; *see also EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016) ("[A]mici's identification of additional possible environmental impacts they claim were not adequately considered by the Commission are not properly before the court.").

"primarily due to lack of access to landowner property"),[6] JA ___; *id*. P 50 (same), JA ___; Certificate Order PP 98-99, JA ___.

Allowing the Pipeline to obtain access to property is a start, but it is certainly not the end. After PennEast obtains survey access, it must submit additional environmental information to the Commission. *See* Certificate Order P 99 (describing additional information PennEast must file), JA ___; Rehearing Order P 45, JA ___; *see also infra* pp. 70-72. And it cannot begin construction until it submits all outstanding survey information and affirms that it has received "all applicable authorizations required under federal law." Rehearing Order P 46, JA ___; *id.* P 31 (PennEast "cannot cut vegetation or disturb ground pending receipt of any federal approvals"), JA ___. The Commission's action here impinges on no constitutional rights.

B. Petitioners fail to show any violation of their due process rights.

Environmental Petitioners also assert that the Commission violated landowner-petitioners' federal due process rights by authorizing eminent domain without a pre-deprivation hearing by the "agencies with the authority to block construction." Br. 34-35. But "there is no right to a pre-deprivation hearing" in

[6] New Jersey insists that PennEast sought "perpetual" rights-of-way and did not offer "inducements" to landowners for temporary property access, but the record evidence it cites offers no support for this claim. Br. 33 (citing Application, Appendix I, R.2741).

the takings context, as this Court held last year (in a case brought by one of the Environmental Petitioners). *Del. Riverkeeper Network*, 895 F.3d at 111.

Rather, an eminent domain proceeding, as contemplated by the Natural Gas Act, satisfies landowners' right to a hearing that affords them due process. *Id*. at 110-11 ("[T]he landowner will be entitled to just compensation, as established in a hearing that itself affords due process," as the Act ensures that any eminent domain action shall conform with the practice and procedure of such actions in the courts of the state where the property is situated) (citing 15 U.S.C. § 717f(h)). As this Court confirmed, "[d]ue process requires no more" in the takings context here. *Id*. at 111.

And while they had no right to a pre-deprivation hearing, Environmental Petitioners (along with the many other parties) had ample opportunity to be heard before the Commission issued the certificate of public convenience and necessity. *See, e.g.*, Certificate Order PP 93-97, 102, JA ___-__, ___; *supra* pp. 8-10. They also exercised their right under the Natural Gas Act to seek rehearing of the Certificate Order under 15 U.S.C. § 717r(a), and are exercising here their right to seek judicial review before an Article III court under 15 U.S.C. § 717r(b).

Petitioners also had other avenues to raise concerns over delays or interim harms. 15 U.S.C. § 717r(c) allows aggrieved parties to seek a stay from the agency. They can also file a mandamus action "directly in the court of appeals."

Del. Riverkeeper, 895 F.3d at 113. Petitioners sought both forms of relief here. *See* Rehearing Order PP 4, 13 (dismissing multiple stay requests as moot in light of disposition of their rehearing requests), JA ___, ___; Pet. for Writ of Mandamus, *In re Del. Riverkeeper Network*, No. 18-1127 (D.C. Cir. filed May 9, 2018; dismissed Sept. 5, 2018, in light of agency action on rehearing); *see also In re PennEast Pipeline Co., LLC*, Nos. 19-1191, *et al*. (3d Cir. Mar. 19, 2019) (granting motion for stay of construction and stay of just-compensation portion of litigation pending appeal by New Jersey state agencies in PennEast's eminent domain proceeding in federal district court).

Moreover, there is no heightened risk of an erroneous deprivation in not waiting for the states to act because PennEast may not begin construction until it receives all outstanding approvals. *See* Envtl. Br. 37. The Natural Gas Act gives the Commission the authority to attach "reasonable terms and conditions" to the certificate. 15 U.S.C. § 717f(e). The Commission used that authority here to prohibit PennEast from beginning construction "unless and until there is a favorable outcome on all outstanding requests for necessary federal and state approvals." Rehearing Order P 31, JA ___; *see also* Certificate Order Appendix A, Condition 10 ("[B]efore commencing construction of any project facilities, . . . PennEast must file with the Secretary documentation that it has received all

applicable authorizations required under federal law (or evidence of waiver thereof).”), JA ___.

Part of the alleged due process violation here is a claim that the Commission violated the statute—i.e., it failed to follow the Natural Gas Act’s mandate to integrate all necessary federal authorizations into a single process. *See* Br. 34-35. This statutory violation, so goes Environmental Petitioners’ theory, also denied landowners notice and the ability to comment in permit proceedings before two state agencies: the New Jersey Department of Environmental Protection and the Delaware River Basin Commission. *See* Br. 35.

Environmental Petitioners fail to explain, however, how any Commission-imposed schedule inhibits their ability to engage state agencies, which proceed independent of the Commission. *See also* Rehearing Order P 55 (noting that its authorization of eminent domain before other agencies have acted does not “impact any substantive determinations that need to be made by the states” under other federal statutes), JA ___. While Environmental Petitioners contend that the Commission should have waited for other agencies to act before issuing a certificate, *see* Br. 36-38, this critique of FERC’s *substantive* decision does not show a denial of *procedural* due process under the familiar *Mathews v. Eldridge* framework. *See, e.g.*, *Lightfoot v. Dist. of Columbia*, 448 F.3d 392, 401 (D.C. Cir. 2006) (“The issue is always, in [the Supreme Court’s] due process cases, whether

or not the claimant has had a fair opportunity—sometimes rather informal—to present his case and not whether the agency's substantive decision was reasonable.") (Silberman, J., concurring); *see also supra* pp. 30-31 (citing cases upholding the Commission's issuance of conditional certificates before state agencies have issued necessary permits under federal laws); 15 U.S.C. § 717r(c) (neither a request for agency rehearing nor a petition for judicial review shall operate as a stay of a Commission order).

VI. The Commission's environmental review fully complied with the National Environmental Policy Act.

The Commission considered data from a variety of sources to inform its environmental analysis, including field surveys, information provided by PennEast and further developed from data requests, scoping meetings with the public, literature research, information gathered from federal, state, and local agencies, and comments from individual members of the public. EIS at ES-1, JA ___; Certificate Order P 98, JA ___. From its analysis, the Commission concluded that many if not most adverse environmental impacts would be temporary, and that mitigation measures would adequately reduce any negative environmental effects to "less than significant levels." Certificate Order PP 98, 131-32, 143, 163, 182, 185, JA ___, ___, ___, ___, ___, ___, ___; Rehearing Order PP 126, 142, 158, JA ___, ___, ___; EIS at 4-29, 4-44, 4-74, JA ___, ___, ___.

A. The Commission reasonably declined to analyze environmental impacts associated with upstream natural gas production.

Council on Environmental Quality regulations require the Commission to examine the direct, indirect, and cumulative impacts of proposed actions. 40 C.F.R. § 1508.25(c). Indirect impacts are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. § 1508.8(b). Here, the Commission reasonably concluded that the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor reasonably foreseeable consequences of approval of an infrastructure project. Certificate Order P 197, JA ___.

Environmental Petitioners claim the Commission failed to discuss the significance (including context and intensity) of effects related to upstream production. Br. 11-12. Their objection to the Commission's consideration of indirect effects related to downstream end use is limited to the Commission's alleged failure to use certain tools that would meaningfully disclose the impact of greenhouse gas emissions. Br. 12. Neither claim has merit.

1. The Commission's approval of the Project is not the legally relevant cause of any potential increased natural gas production.

NEPA "requires a reasonably close causal relation between the environmental effect and the alleged cause," akin to the "familiar doctrine of

proximate cause from tort law." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. at 767 (internal quotations omitted). A "but for" causal relationship is not enough. As a result, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation" will not constitute an indirect impact of agency action if "the causal chain is too attenuated." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). Moreover, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Pub. Citizen*, 541 U.S. at 770.

The Commission reasonably determined that natural gas production gives rise to the need for interstate transportation, not the other way around. It found that "once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas." Certificate Order P 197, JA ___.

Although the Commission acknowledged that "natural gas production and transportation facilities are all components of the general supply chain," this "does not mean, however, that approving [the PennEast Project] will induce further shale gas production." *Id*. P 200, JA ___; *see also id*. P 197, JA ___; EIS at 1-21, JA ___. "[A] causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed

pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas)." Rehearing Order P 107, JA ___.

The Commission also recognized that many other factors drive production, "such as domestic natural gas prices and production costs." Certificate Order P 200, JA ___. And even without the PennEast Project, the Commission found that natural gas from additional production still would reach markets through alternate modes of transportation. *Id*. These Commission findings, "[b]ased on its expertise and experience," are due deference. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 67 (D.C. Cir. 2014).

2. The impacts, including greenhouse gas emissions impacts, of any potential increased natural gas production activities are not reasonably foreseeable.

Although NEPA requires "reasonable forecasting," an agency is not required "to engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration." *N. Plains Res. Council v. Surface Transp. Board,* 668 F.3d 1067, 1078 (9th Cir. 2011); *see also Sierra Club v. Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (noting that "reasonable [is] the operative word" under NEPA); *EarthReports, Inc, v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) ("[T]o warrant consideration under NEPA, an effect had to be sufficiently likely to occur that a person of ordinary prudence

would take it into account in reaching a decision." (internal quotations omitted)).

The Commission correctly found that impacts related to upstream production, including greenhouse gas emissions, are not reasonably foreseeable. *See* Certificate Order P 198, JA ___; Rehearing Order PP 108-09, 114-17, JA ___, ___-__. The record before FERC lacked sufficient information both as to the origin of the gas to be transported and forecasts to allow any meaningful prediction of production-related impacts. Certificate Order P 198, JA ___. And information about the "location, scale, and timing of any additional wells are matters of speculation," as the Commission explained. *Id*. P 201, JA ___.

Environmental Petitioners claim they provided "modeling" for locations in Pennsylvania where they expect natural gas production will take place. Br. 10. That modeling, however, offered no more than speculation about future locations of wells based on sites that were only permitted but not drilled. *See* Delaware Riverkeeper Rehearing Request at 54-55, R.10777, JA ___-__. A list of locations where drilling did not occur offers little information about where it will occur. And while Environmental Petitioners assert that historical drilling and permitting activity is an accurate indicator for new well-pad development, they cite no authority for that proposition.

The Commission thus reasonably found no forecasts in the record that would enable the Commission to meaningfully predict production-related impacts, "many

of which are highly localized." Rehearing Order P 109, JA ___. The general location of natural gas production is not enough—"meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary by producer and depending on the applicable regulations in the various states." *Id*. The Project here has no identifiable dedicated supply area, much less information regarding the locale and number of specific wells or details about production methods. Certificate Order P 198, JA ___; Rehearing Order PP 108-109, 114-117, JA ___, ___-__; *see* EIS at 1-21 ("the location and subsequent production activity is unknown and too speculative to assume based on the interconnected interstate natural gas pipeline system"), JA ___.

Moreover, much of the information lacking here concerning future production trends falls within state jurisdiction over production. Certificate Order P 198, JA ___; EIS at 1-21, JA ___; *see also Sierra Club v. Dep't of Energy*, 867 F.3d at 200 ("At a certain point, the Department's obligation to drill down into increasingly speculative projections about regional environmental impacts is also limited by the fact that it lacks any authority to control the locale or amount of export-induced gas production, much less any of its harmful effects.").

Environmental Petitioners also ignore this Court's 2016 *Sierra Club v. FERC*

decision, where the Court found that the Commission's NEPA analysis need not consider upstream production impacts if "the asserted linkage" between those impacts and the pipeline was "too attenuated." 827 F.3d 36, 47 (D.C. Cir. 2016). There, as here, parties failed to cite record evidence that the pipeline would lead to increased gas production "because no specific shale-play had been identified as a source of natural gas." *Id*. (internal quotations omitted). And there, as here, nothing suggested that the pipeline would transport gas from "future, induced natural gas production, as opposed to from existing production." *Id*. (emphasis in original) (internal quotations omitted); *see also Sierra Club v. FERC*, 827 F.3d 59, 69 (D.C. Cir. 2016) (Commission need not examine upstream impacts where the record did not establish that the project would "necessitate an increase in domestic natural gas production"); *Coal. for Responsible Growth & Res. Conservation v. FERC,* 485 F. App'x 472, 474 (2d Cir. June 12, 2012) (affirming FERC's conclusion that the impacts of mid-Atlantic shale development were not sufficiently causally related to the certificated pipeline project to warrant more than a short discussion in the Environmental Assessment).

3. The Commission reasonably determined that it could not assess the significance of impacts related to upstream production.

Council on Environmental Quality regulations require discussion of the "significance" of indirect impacts (40 C.F.R. § 1502.16(b)) to ensure that the

agency engages in "informed decision making" and makes "informed public comment" possible. *See, e.g., Sierra Club*, 867 F.3d at 1374 (internal quotations omitted).

The Commission reasonably determined it would be inappropriate to ascribe significance to a given rate or volume of greenhouse gas emissions because there is no widely accepted standard for doing so. *See Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 27 (2018) (on remand from this Court's indirect, end-use effects decision in *Sierra Club v. FERC*, 867 F.3d 1357); *see also* Rehearing Order P 123 (adopting analysis in *Fla. Se.* remand order), JA ___. Nevertheless, the Commission provided context for the emissions here by comparing them to regional and national emissions, thereby furthering the goals of informed decision making and informed public comment. *See* Certificate Order P 209, JA ___; *see also Town of Weymouth*, No. 17-1135, 2018 WL 6921213, at *2 (affirming Commission's consideration of greenhouse gas emissions because the agency quantified those emissions and compared them to regional climate change goals).

4. The Commission went beyond the requirements of NEPA and provided generalized information regarding the potential impacts associated with upstream natural gas production.

Even assuming upstream production is an indirect effect as defined by Council on Environmental Quality regulations, the Commission addressed upstream impacts along with their significance. *See* Certificate Order PP 202-206,

JA ___-__.

The Commission quantified the greenhouse gas emissions from gas extraction and processing, and from non-project pipelines, using the conservative assumption that "all gas transported represents new, incremental production." Certificate Order P 203, JA ___. Using an estimate of the average gallons used per well (between 3.88 and 5.69 million gallons), the Commission also projected the volume of water required for drilling and development of wells over a 30-year period: between 300 and 880 million gallons per year. *Id*. P 205, JA ___.

The Commission also estimated that production would affect between 120 and 230 acres per year within the Marcellus shale basin. *Id*. P 204 (between 2,400 and 4,600 well pads over the estimated 30-year life of the project, each one affecting 1.48 acres of land), JA ___. Environmental Petitioners dispute that estimated size of the average well pad as too low, stating the number of acres affected per well pad is 3.5 acres. Br. 9. But they did not challenge the acreage estimate in their requests for rehearing, so this Court does not have jurisdiction over this claim. *See* 15 U.S.C. § 717r(b).

In any event, the Commission's estimate comes not from "thin-air," *see* Envtl. Br. 9, but from a Department of Energy report. *See* Life Cycle Analysis of Natural Gas Extraction and Power Generation, Dep't of Energy and Nat'l Energy Tech. Laboratory, DOE/NETL-2015/1714 at 22 (Aug. 30, 2016) ("Life Cycle

Analysis") (estimating 6,000 square meters (1.48 acres) as the number of acres affected in the Marcellus shale basin); *see, e.g.*, *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042 P 292 n.412 (2017). The Commission, moreover, acknowledged impacts to water resources and air quality, including climate change, and considered the possibility that natural gas consumption may enable gas production to replace the use of "other carbon-based energy sources." Certificate Order P 199 (citing U.S. Department of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States*, 79 Fed. Reg. 48,132 (Aug. 15, 2014) (Department of Energy Addendum)), JA ___; *see also Sierra Club*, 867 F.3d at 201 (upholding agency's reliance on Department of Energy Addendum).

These Commission findings satisfy NEPA's mandate of informed agency decisionmaking.

5. The Commission reasonably declined to monetize impacts from greenhouse gas emissions using particular tools.

Environmental Petitioners also fault the Commission for not analyzing secondary impacts of downstream emissions by using the Social Cost of Carbon tool or by estimating the value of "ecosystem services." Br. 12-16.

The Environmental Impact Statement estimated direct impacts of greenhouse gas emissions associated with the Project's construction and operation. *See* EIS at 4-333 – 4-334 (Table 4.12.4-1 (construction) and Table 4.12.4-2

(operation)), JA ___–___. It also quantified the emissions associated with consumption, assuming that "the Project transports the maximum dekatherms per day of natural gas and that all of the gas being transported is used for additional combustion." EIS at 4-334, JA ___.

This Court recently upheld the Commission's determination that the Social Cost of Carbon is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. *See Appalachian Voices*, No. 17-1271, 2019 WL 847199 at *2 (Commission did "all that is required for NEPA purposes"; petitioners failed to address the agency's reasons for rejecting the Social Cost of Carbon tool); *see also EarthReports*, 828 F.3d at 956 (D.C. Cir. 2016) (accepting Commission's rejection of the Social Cost of Carbon based in part on the difficulty of determining significance).

The Commission adopted the reasoning from its order on remand from this Court's 2017 *Sierra Club v. FERC* decision. There, it explained why the Social Cost of Carbon "is not appropriate in project-level NEPA review, and cannot meaningfully inform the Commission's decisions on natural gas infrastructure projects under the [Natural Gas Act]." Rehearing Order P 123 (citing *Fla. Se.* remand order, 162 FERC ¶ 61,233, at PP 30-51), JA ___; *see also Sierra Club*, 867 F.3d at 1375 (observing that the Commission had previously found Social Cost of Carbon tool unhelpful "because several of its components are contested and

because not every harm it accounts for is necessarily 'significant' within the meaning of NEPA"). The U.S. Environmental Protection Agency has taken the same position. *See* Rehearing Order P 123 & n.278, JA ___.

In the *Florida Southeast* remand order—which Environmental Petitioners do not address—the Commission found no consensus on "the appropriate [discount] rate to use for analyses spanning multiple generations and consequently, significant variation in output can result." *Fla. Se.* remand order, 162 FERC ¶ 61,233, at P 35 (internal quotations omitted). There is thus "no basis to designate a particular dollar figure calculated from the Social Cost of Carbon tool as 'significant.'" *Id.* P 51; *see also id.* P 40 (siting of natural gas infrastructure "necessarily involves making qualitative judgments between different resources as to which there is no agreed-upon quantitative value"); Rehearing Order P 119 & n.267, JA ___, JA ___-___. Thus, the presentation of information about limited, discrete socioeconomic benefits does not render the Commission's reasoning arbitrary, as amicus curiae Institute for Policy Integrity asserts, Amic. Br. 14-17.

As for Environmental Petitioners' argument that the Commission should estimate ecosystem service value, Br. 15, as discussed above the Commission has consistently found monetizing environmental impacts to be inappropriate for project-level decision-making, and Petitioners cite no authority requiring a different approach. *See* Rehearing Order P 119 & n.267, JA ___-___; *see also id.*

P 123 & n.278, JA ___-___.

B. The Commission conducted an informed analysis of potential impacts to water resources, wetlands, protected species, and cultural resources.

New Jersey argues that the Commission's environmental analysis was deficient because PennEast was unable to conduct field surveys for most (65%) of the Project's path in New Jersey. Br. 25. New Jersey also challenges the range of data sources the Commission considered as mere "desktop" materials that cannot possibly satisfy NEPA. *Id*. at 31. According to New Jersey, NEPA *requires* field surveys because publicly available information cannot "match the accuracy of field surveys." *See id*. at 27-31.

Contrary to New Jersey's suggestion, this Court has refused to interpret NEPA to require "that [c]omplete information concerning the environmental impact of a project … be obtained before action may be taken." *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978) (internal quotations omitted); *vacated in part on other grounds sub nom.*, *W. Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978). The operative question is instead whether the agency has made a "fully informed" and "well-considered" assessment of the Project's likely environmental impacts. *Myersville*, 783 F.3d at 1325 (internal quotations omitted).

A decision is "fully informed" and "well-considered" if the agency considers all likely environmental impacts (*id.* at 1324-25; *Andrus*, 580 F.2d at 473),

provides "sufficient discussion of the relevant issues and opposing viewpoints" based on "substantial evidence" in the record (*Myersville*, 783 F.3d at 1325; *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992)), and acknowledges uncertainties where they exist (*U.S. Dep't of Interior*, 952 F.2d at 546; *Andrus*, 580 F.2d at 473). Moreover, an agency's decision may be "fully informed" even absent information that could resolve uncertainties where gathering additional information proves impractical. As the Supreme Court has explained, "practical considerations of feasibility" may legitimately restrict the scope of NEPA review. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976); *see also Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 764 (9th Cir. 1996) ("NEPA does not require the government to do the impractical.") (citing *Kleppe*, 427 U.S. at 414); *Tongass Conservation Soc'y v. Cheney*, 924 F.2d 1137, 1144 (D.C. Cir. 1991) (Ginsburg, R.B., J.) (agency satisfied NEPA where it "ma[de] reasonable efforts to acquire relevant information").

By contrast, an agency shirks its NEPA obligations if it relies on "crystal ball inquir[ies]" of environmental effects, *Andrus*, 580 F.2d at 473, or entirely fails to consider an important aspect of the environmental analysis, *see, e.g.*, *Am. Rivers v. FERC*, 895 F.3d 32, 53 (D.C. Cir. 2018); *Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 559 (9th Cir. 2011) (criticizing agency for "ignor[ing]" an aspect of the analysis "completely"); *LaFlamme v. FERC*, 852 F.2d 389, 399-401 (9th Cir. 1988)

(unreasonable to not even consider environmental impacts before licensing a project).

Here, the Commission satisfied its NEPA obligations by considering all likely environmental impacts, collecting information from a broad array of sources—including field survey data, where available—and acknowledging uncertainties.

Water resources. Regarding subsurface water resources, FERC studied information from the U.S. Geological Survey, New Jersey and Pennsylvania environmental agencies, the U.S. Environmental Protection Agency, and data derived from consultations with other agencies to identify public and private wells in the Project area. EIS at ES-1, 4-31 – 4-37, 4-41, JA ___, ___–___, ___. The Commission found that, irrespective of a lack of precise location information for some private wells along the pipeline route, the Project was unlikely to adversely affect groundwater quality. Certificate Order PP 108, 110, 124, JA ___, ___, ___; EIS at 4-43, JA ___. That is in part because pipeline installation would involve excavation at a depth of only seven to ten feet, meaning any impacts would be confined to "surficial aquifers near the ground surface." EIS at 4-42, JA ___.

The story is similar for the Commission's analysis of surface water impacts. To be sure, landowners denied access to some areas. But the Commission was able to identify water resources in the Project area by consulting waterbody crossing

data from existing databases maintained by the Pennsylvania Fish and Boat Commission and New Jersey Department of Environmental Protection, as well as U.S. Geological Survey topographic maps. EIS at 4-47, JA ___; Rehearing Order P 46, JA ___. And while New Jersey complains that field survey data are lacking for wetlands, the Commission approximated wetland boundaries using remote-sensing data aggregated from several sources, as well as obtainable field survey data. Certificate Order PP 129, 132-36, JA ___, ___.

The Commission also imposed mitigation measures to address potential impacts, including impacts to yet-unidentified water resources. While NEPA does not require an agency to resolve uncertainties in its analysis, a hallmark of reasoned decisionmaking is an agency's inclusion of mitigation measures to minimize *potential* impacts where uncertainty exists. *See, e.g.*, *Independence Pipeline Co.*, 91 FERC ¶ 61,102, at p. 61,352 (2000) (mitigation measures "adequately minimized" environmental impacts even absent complete field survey data); *S. Natural Gas Co.*, 85 FERC ¶ 61,134, at p. 61,512 (1998) (mitigation measures "will ensure that all environmental resources will be adequately protected, including unanticipated discoveries"), *aff'd*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960 (D.C. Cir. 2000); *see also Tongass*, 924 F.2d at 1144 (crediting mitigation measures in the environmental analysis). Indeed, in an analogous context, this Court has expressly approved an agency's use

of "environmentally protective defaults" in its models to "compensate[]" for "uncertainty" in the data. *Natural Res. Def. Council v. EPA*, 529 F.3d 1077, 1085 (D.C. Cir. 2008) (reviewing agency action under the Clean Air Act).

Here, PennEast must comply with site-specific measures imposed by relevant state agencies, avoid sensitive areas (e.g., riparian zones) where practicable, and follow FERC's and its own mitigation plans to minimize soil erosion and sedimentation, and to avoid contamination of surface and groundwater resources.[7] Certificate Order PP 109-10, 118-21, 124-25, JA ___, ___-__; Rehearing Order P 158, JA ___; EIS at 4-43, 4-49, 4-58, JA ___, ___, ___. FERC found that, when combined with measures in the Commission's own plans, as well as compliance with state permit requirements, PennEast's plans would "minimize risks from spills or leaks, erosion and sedimentation, and stormwater runoff …." EIS at 4-58, 5-7, JA ___, ___; Certificate Order P 131, JA ___. Moreover, while the Project will permanently affect 0.01 acre of wetlands, FERC determined that avoidance and minimization measures, as well as additional environmental

[7] As relevant to New Jersey's petition, those plans include PennEast's Karst Mitigation Plan, Horizontal Directional Drilling Plan for Karst Terrain, Horizontal Directional Drilling Inadvertent Returns and Contingency Plan, Erosion and Sediment Control Plan, Spill Prevention Control and Countermeasures Plan, and its Well Monitoring Plan, as well as FERC's Upland Erosion Control, Revegetation, and Maintenance Plan, and its Wetland and Waterbody Construction and Mitigation Procedures. Certificate Order PP 106, 110, 118, 120, 133, JA ___, ___, ___-__, ___.

conditions attached to PennEast's certificate, would reduce impacts to all other wetlands to "less than significant levels." Certificate Order PP 132-33, 135-36, JA ___, ___.

New Jersey also challenges PennEast's proposal to use horizontal directional drilling for certain waterbody crossings. It argues this particular mitigation measure is inadequate because geotechnical field surveys are not yet complete, Br. 30, which is due to landowner refusals, Rehearing Order P 47, JA ___. Those surveys can help determine with greater confidence the feasibility of horizontal directional drilling in certain areas. Certificate Order PP 120-121 & Appendix A, Conditions 16, 19, JA ___-__, ___-__. But New Jersey ignores the data on which FERC *did* rely—namely, geotechnical field surveys performed at *most* horizontal directional drill crossings, and publicly available data of geological conditions at *every* such crossing. *Id*. P 120, JA ___; Rehearing Order P 47, JA ___. And, in any event, FERC attached an environmental condition to its certificate requiring that, prior to construction, all geotechnical investigations must be completed to, among other things, finalize a horizontal directional drilling feasibility assessment. Certificate Order P 120 & Appendix A, Condition 19, JA ___, ___.

Environmental Petitioners also claim the Commission lacked substantial evidence as to possible erosion in Hopewell Township, New Jersey from the Project, and violated the Natural Gas Act by not including conditions in the

Certificate to protect township residents. *See* Br. 39. But the Commission, in fact, considered erosion and tree removal from the Project and imposed reasonable conditions to mitigate any harmful effects. Before PennEast may commence construction, it must submit a revised Erosion and Sediment Control Plan for FERC staff review and approval. *See* Rehearing Order P 158, JA ___. As required by the Certificate Order, that revised Plan must include a "complete review" of waterbody crossings with "steep slopes" and site-specific erosion and restoration measures. Certificate Order Appendix A, Condition 27, JA ___. With implementation of that Plan, the Environmental Impact Statement accordingly found that any erosion-related impacts "would be appropriately mitigated." Rehearing Order P 158 (citing EIS at 4-57 – 4-58, JA ___-__), JA ___-__. This record is sufficient under the substantial-evidence standard. *See, e.g.*, *Wisc. Power & Light Co. v. FERC*, 363 F.3d 453, 464 (D.C. Cir. 2004) (substantial evidence may include "findings made in light of uncertainty"); *U.S. Dep't of Interior*, 952 F.2d at 546.

Protected species. New Jersey's focus on field surveys similarly obscures information FERC relied on to assess impacts to protected species. Through consultation with the relevant state and federal agencies, FERC identified protected species in the Project area. Certificate Order PP 146, 148, JA ___-__; EIS at 4-108, 4-127 – 4-139, JA ___, ___-__. As concerns federally-listed species, the U.S.

Fish and Wildlife Service—the expert agency tasked with conserving species listed under the Endangered Species Act—concluded that, should its proposed conservation measures be adopted, adverse impacts were not likely for all but two listed species, and that the Project would not jeopardize the continued existence of those other two (the bog turtle and northern long-eared bat). Certificate Order P 147, JA ___. The Commission conditioned certification on compliance with those conservation measures. *Id*. P 147 & Appendix A, Condition 36, JA ___, ___. In addition, prior to construction, PennEast must complete all remaining field surveys and provide survey reports to the appropriate agencies. Rehearing Order P 146, JA___; Certificate Order Appendix A, Condition 36, JA ___.

FERC followed a similar approach for state-listed species. New Jersey complains that PennEast did not conduct field surveys for "multiple" state-listed species. Br. 29. But PennEast *has* conducted field surveys—or was in the process of conducting surveys at the time the Environmental Impact Statement was published—for the vast majority of state-listed species that could potentially occur in the Project area. EIS at 4-125 – 4-138, JA ___-___; *see also* Certificate Order P 148, JA ___. And, at any rate, for nearly all listed species potentially occurring in the vicinity, FERC consulted survey data, publicly available information (including data provided by state wildlife agencies), or both, to identify their known or potential locations and to assess species impacts. *See, e.g.*, EIS at 4-94 –

4-95, 4-127 – 4-138, JA ___-___, ___-___.

To be sure, some data regarding species occurrence is incomplete. *See* Certificate Order PP 148, 150, JA___-__. But FERC addressed this fact by requiring PennEast to consult, prior to construction, with the relevant state agencies to "complet[e] all necessary surveys for state species," and to develop a "comprehensive list of measures … to avoid or mitigate impacts on state-listed species and state species of concern." *Id.* P 148 & Appendix A, Condition 39, JA___, ___. The results of those consultations—which FERC must review and approve prior to construction—will, among other things, provide additional information on species occurrence. *See id*. P 148, JA___.

Cultural resources. New Jersey again cites lack of survey data in challenging FERC's review of cultural resources (Br. 30), but its approach fares no better here.

First, the Commission considered consultations between PennEast and the Pennsylvania and New Jersey State Historic Preservation Offices, comments by the National Park Service, and comments by local tribes and other stakeholders, regarding potential and known cultural resources in the Project area.[8] Certificate

[8] Several tribes expressed no concerns with the Project, and where a tribe did raise concerns, PennEast committed to conducting site evaluation or avoidance measures. EIS at 4-210 – 4-211, JA___-___.

Order PP 168-69, JA ___; EIS at 4-203 – 4-209, JA ___-__. Second, it considered survey data—on-the-ground field surveys, archival research, and desktop reviews—collected by PennEast. Certificate Order P 168, JA ___; EIS at 4-203, 4-213 – 4-215, JA___, ___-__. And third, it imposed mitigation measures PennEast must follow to minimize impacts to cultural resources. Certificate Order Appendix A, Conditions 46-51, JA ___; *see also* EIS at 4-227 – 4-228, JA ___-___. For example, PennEast's Unanticipated Discovery Plans set forth requirements should cultural resources be discovered during construction. EIS at 4-216 – 4-217, 4-227, JA ___-__, ___. Both FERC and the relevant state agencies reviewed those plans. *Id*. at 4-227, JA___.

PennEast also has committed to taking various additional measures to minimize impacts to cultural resources, such as using horizontal directional drilling to avoid historic sites in Pennsylvania and developing cultural resource avoidance plans in conjunction with the relevant state agencies. *See id*. at 4-214 – 4-215, 4-221 – 4-222, JA ___-___, ___-___. Finally, the Commission's certificate order conditions construction on completed assessments—including field surveys—of several potentially affected cultural resources. Certificate Order P 172 & Appendix A, Conditions 46-51, JA ___, ___.

* * *

Based on its independent review of public information and available field

survey data, the Commission conducted a "fully informed" and "well-considered" environmental analysis of the Project's likely environmental impacts. *See Myersville*, 783 F.3d at 1325 (internal quotations omitted). It reasonably concluded that impacts from Project construction and operation would be minor, and that any such impacts—including in areas where specific location data were unavailable—would be adequately reduced through mitigation measures. Certificate Order P 98, JA ___. The Commission therefore satisfied NEPA's "hard look" standard. *Balt. Gas & Elec.*, 462 U.S. at 97. It was not required to wait for complete survey results—which may never have occurred due to landowner refusals—even if that information constitutes the best information available. *See Kleppe*, 427 U.S. at 414 (NEPA does not require an agency to do the impractical); *see also Dep't of Interior*, 952 F.2d at 546 (NEPA contemplates "uncertainty" in the environmental analysis); *Andrus*, 580 F.2d at 473 (NEPA requires agency to acknowledge uncertainties, not resolve them).

C. The Commission complied with the regulation governing "incomplete or unavailable information."

New Jersey attacks the Commission's environmental analysis on another front, arguing that it failed to comply with the regulation governing "incomplete or unavailable information" with regard to field surveys. Br. 32-34 (citing 40 C.F.R. § 1502.22). That regulation requires an agency to make certain findings "[i]f the information relevant to reasonably foreseeable significant adverse impacts cannot

be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known." 40 C.F.R. § 1502.22(b); *see also Tongass*, 924 F.2d at 1144 n.7 (assessing applicability of § 1502.22(b)); *Mont. Wilderness Ass'n,* 666 F.3d at 559 (same). In that circumstance, an agency must (1) acknowledge that relevant information is "incomplete or unavailable," (2) state the information's relevance "to evaluating reasonably foreseeable significant adverse impacts on the human environment," (3) summarize relevant "existing credible scientific evidence," and (4) evaluate environmental impacts using "theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. § 1502.22(b).

The Commission satisfied § 1502.22(b) here. It acknowledged the relevance of incomplete field surveys that could not be conducted due to landowner refusals, summarized the evidence that *was* available, and assessed environmental impacts based on that evidence. Specifically, the Commission began by stating expressly that field survey data were "lacking." Certificate Order P 100 (citing 40 C.F.R. § 1502.22), JA___; *see also id*. P 98 (acknowledging "incomplete surveys"), JA___. It then explained that additional field survey data were relevant because that information would "ensure[] the [Environmental Impact Statement's] analyses and conclusions are verified based on the best available data," thereby "enabling [the Commission] to improve and finalize certain mitigation plans and ensure

stakeholder concerns are addressed." *Id*. P 99, JA___; *see also id*. Appendix A, Conditions 16, 21, 36, 51 (conditioning construction on completed field surveys), JA ___, ___, ___, ___. Finally, as discussed in the previous section, the Commission summarized the scientific data that *were* available, and analyzed likely environmental impacts based on that data. *See id*. P 98 (listing information sources consulted, and confirming that "the conclusions in the final EIS … were based on the information contained in the record" and "mitigation measures that … will adequately and reasonably reduce … environmental impacts"), JA___.

FERC's satisfaction of each step of the analysis distinguishes this matter from those cases where courts found a § 1502.22 violation. For example, in *Montana Wilderness Association*, the Forest Service failed to appreciate the relevance of increased vehicular use in its environmental analysis, even though that information was integral to determining the wilderness character of a plot of land. 666 F.3d at 559-60. And in *Lands Council v. Powell*, the Forest Service failed to even disclose that its modeling was "incomplete and ignored key variables" that were relevant to determining sedimentation in a watershed. 395 F.3d 1019, 1031-32 (9th Cir. 2005). The Commission here, by contrast, both acknowledged incomplete survey data *and* appreciated that data's relevance to its environmental analysis.

New Jersey, however, insists the Commission must also comply with

§ 1502.22(a). That provision requires that an environmental analysis include missing information if it is "essential to a reasoned choice among alternatives" *and* if costs of doing so are "not exorbitant." Br. 26, 32. But, as reflected in *Tongass* and *Montana Wilderness Association*, which addressed compliance only with subsection (b), subsections (a) and (b) are alternatives. Here, because field survey data "cannot be obtained" due to landowner refusals, the relevant provision is § 1502.22(b), not (a). And, at any rate, the Commission *did* find that the missing information was not "essential" to choosing between alternatives, explaining that "the substantial environmental record and mitigation measures sufficiently support reaching a decision on this project." Certificate Order P 98, JA ___.

D. The Commission required what Petitioners demand: the best information available through completed field surveys.

As discussed, the Commission conditioned construction on completed field surveys, as well as compliance with modifications resulting from the new information (*see supra* pp 41, 68). Certificate Order Appendix A, Conditions 16, 21, 36, 51, JA ___, ___, ___, ___; *see also* EIS at ES-6, 4-38, 4-228, JA ___, ___, ___. New Jersey attempts to discredit the Commission's conditional approval by insisting that the additional information will not matter because "FERC … assert[ed] in advance that the information gathered by compliance with the conditions would *not* change the project in any meaningful way." Br. 34 (emphasis in original).

Not so. In fact, the Commission explained that the new information would be used to "improve and finalize certain mitigation plans," to "ensure stakeholder concerns are addressed," and, more broadly, to "impose any additional measures deemed necessary to … avoid[] or mitigat[e] … unforeseen adverse environmental impacts resulting from project construction and operation." Certificate Order PP 99, 216 & Appendix A, Condition 2, JA ___, ___, ___; Rehearing Order P 45, JA ___.

This Court has endorsed such "reopener" clauses, acknowledging that they allow an agency to modify its prior decision in light of newly acquired information. *See, e.g.*, *Dep't of Interior*, 952 F.2d at 547 (approving FERC hydroelectric license that included a reopener clause allowing future modifications, thereby "protect[ing] against unknown risks"). And, in any event, New Jersey's view that the conditions in the Certificate are not "meaningful" (Br. 34) does not show uninformed agency action in violation of NEPA. *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) ("NEPA merely prohibits uninformed—rather than unwise—agency action").

New Jersey also asserts that PennEast's use of eminent domain authority—which the Natural Gas Act conferred once the Commission certificated the Project, *Midcoast*, 198 F.3d at 973, *see supra* pp. 31-32—in order to complete field surveys amounts to a "dramatic" use of that power, Br. 34. But, in fact, the opposite is true:

while the Commission issued PennEast a conditional certificate that comes with eminent domain authority, it prohibited PennEast from engaging in construction until conditions attached to the Certificate (including completed field surveys) are met. *See, e.g.*, Certificate Order Appendix A, Conditions 6.h, 21-35, 37-44, 46-51, 56, JA ___, ___, ___, ___, ___.

Ultimately, New Jersey's grievance is with the scope of any NEPA review. But, as discussed, the Commission's environmental analysis satisfied NEPA. And once it completed that analysis, the Commission was equipped to make a reasoned public interest finding under the Natural Gas Act. That it conditioned Project approval on completed field surveys—what New Jersey demands—is all for the good.

E. The Commission reasonably considered alternatives.

Environmental Petitioners also challenge the Commission's dismissal of the "no action" alternative and purported failure to examine project purpose. Envtl. Br. 16. In fact, however, the Commission reasonably considered and addressed the no-action alternative.

The Commission affirmed the Environmental Impact Statement's conclusion that taking no action would fail to fulfill the proposed Project's objective, even if doing so may avoid adverse environmental impacts. Rehearing Order P 90 (citing EIS at 3-3, JA ___), JA ___. There were no renewable-energy projects under

consideration that would supply the intended market for the Project with, or reduce consumption by, the equivalent energy proposed by the Project. *See id*. And a combination of increased renewable electricity with increased energy efficiency and conservation would not satisfy the purpose of the Project, i.e., to transport gas along a particular pathway from production regions to consumption areas. *See id*.; EIS at 3-3, JA ___; *see also* EIS at ES-16 ("no available capacity for existing pipeline systems to transport the required volumes of natural gas to the range of delivery points proposed by PennEast"), JA ___. The Commission's reasonable consideration of the no-action alternative is consistent with NEPA under this Court's precedent. *See, e.g*., *Appalachian Voices*, No. 17-1271, 2019 WL 847199 at *2; *see also Myersville*, 783 F.3d at 1323.

Environmental Petitioners' claim that the Commission's failure to examine project purpose also created an "independent failure to rigorously explore" the no-action alternative, Br. 16, conflates two distinct statutory requirements—NEPA's requirement of a description of the purpose and need for the project and the Commission's determination of "public need" as required by the Natural Gas Act's "public convenience and necessity" standard. *See* Rehearing Order P 87, JA ___. In any event, the record here conforms to Council on Environmental Quality regulations on evaluation of alternatives. Under those regulations, the Environmental Impact Statement must describe the purpose and need of the project

only to the extent necessary to inform the analysis of alternatives. *Id*. P 83, JA ___; *see also* 40 C.F.R. § 1502.13 (impact statement must include a statement to "briefly specify the underlying purpose and need to which the agency is responding in proposing alternatives including the proposed action") (cited at Rehearing Order P 83 & n.192, JA ___-__).

As the Commission concluded, the Environmental Impact Statement did just that: it appropriately noted the Project's primary objective as stated by the applicant, which is "to provide about 1.1 million dekatherms per day . . . of year-round natural gas transportation service from northern Pennsylvania to markets in New Jersey, eastern and southeastern Pennsylvania, and surrounding states." Rehearing Order P 84 (quoting EIS at 3-1, JA ___), JA ___; *see also* EIS at 3-3, JA ___. The Commission has approved this level of particularity for defining the project purpose—i.e., transporting a specific volume of gas from specified receipt points to specified delivery points—for other gas pipeline projects. *See* Rehearing Order P 85, JA ___. And this Court has approved agency considerations of alternatives that accord "substantial weight to the preferences of the applicant." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197-98 (D.C. Cir. 1991) (internal quotations omitted); *see also City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994).

The Commission's review of other reasonable alternatives led it to conclude

that none of the alternatives offered significant environmental advantages, were technically and economically feasible, or otherwise met the project's stated purpose. *See* Rehearing Order P 85, JA ___. While Environmental Petitioners also critique the Commission for not fully exploring (before issuing the Certificate Order) an alternate site for an interconnection with the Transco pipeline system (the "Hopewell Alternative"), Br. 16-17, the Commission explained that PennEast was prohibited from starting construction until it gave additional details on this alternative's feasibility. *See* Rehearing Order P 97, JA ___; Certificate Order P 215, JA ___; *see also* EIS at 3-37 – 3-39 (describing Transco Interconnect Alternative and noting that additional information was necessary to evaluate it), JA ___-___. Moreover, the range of alternatives that must be considered is well within the Commission's discretion. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551-52 (1978). In light of the record here, Environmental Petitioners cannot show that the Commission's evaluation of alternatives transgressed NEPA's requirements. *See, e.g.*, Certificate Order P 211 (listing alternatives considered), JA ___; EIS at 3-1 – 3-39, JA ___-___.

CONCLUSION

The petitions for review should be denied and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e) and this Court's Order of August 30, 2018, I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 16,569 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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ADDENDUM

STATUTES AND REGULATIONS

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STATUTES: **PAGE**

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency pro-

tection Agency and the Governor of Massachusetts shall undertake to identify and make available sources of funding to support activities pertaining to Massachusetts Bay undertaken pursuant to or authorized by section 320 of the Clean Water Act [33 U.S.C. 1330], and shall make every effort to coordinate existing research, monitoring or control efforts with such activities.''

PURPOSES AND POLICIES OF NATIONAL ESTUARY PROGRAM

Pub. L. 100–4, title III, §317(a), Feb. 4, 1987, 101 Stat. 61, provided that:

''(1) FINDINGS.—Congress finds and declares that—

''(A) the Nation's estuaries are of great importance for fish and wildlife resources and recreation and economic opportunity;

''(B) maintaining the health and ecological integrity of these estuaries is in the national interest;

''(C) increasing coastal population, development, and other direct and indirect uses of these estuaries threaten their health and ecological integrity;

''(D) long-term planning and management will contribute to the continued productivity of these areas, and will maximize their utility to the Nation; and

''(E) better coordination among Federal and State programs affecting estuaries will increase the effectiveness and efficiency of the national effort to protect, preserve, and restore these areas.

''(2) PURPOSES.—The purposes of this section [enacting this section] are to—

''(A) identify nationally significant estuaries that are threatened by pollution, development, or overuse;

''(B) promote comprehensive planning for, and conservation and management of, nationally significant estuaries;

''(C) encourage the preparation of management plans for estuaries of national significance; and

''(D) enhance the coordination of estuarine research.''

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements.

This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(June 30, 1948, ch. 758, title IV, § 401, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 877; amended Pub. L. 95–217, §§ 61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

§ 715*l*. Repealed. June 22, 1942, ch. 436, 56 Stat. 381

Section, acts Feb. 22, 1935, ch. 18, § 13, 49 Stat. 33; June 14, 1937, ch. 335, 50 Stat. 257; June 29, 1939, ch. 250, 53 Stat. 927, provided for expiration of this chapter on June 30, 1942.

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out this chapter, is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

CODIFICATION

Section was not enacted as a part act Feb. 22, 1935, which comprises this chapter.

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

Sec.

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, § 1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102–486, title IV, § 404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(a), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–58 inserted ''and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,'' after ''such transportation or sale,''.

1992—Subsec. (d). Pub. L. 102–486 added subsec. (d).

(d) Inspections

The State commission of the State in which an LNG terminal is located may, after the terminal is operational, conduct safety inspections in conformance with Federal regulations and guidelines with respect to the LNG terminal upon written notice to the Commission. The State commission may notify the Commission of any alleged safety violations. The Commission shall transmit information regarding such allegations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

(June 21, 1938, ch. 556, §3A, as added Pub. L. 109–58, title III, §311(d), Aug. 8, 2005, 119 Stat. 687.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase,

specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; Pub. L. 87–454, May 21, 1962, 76 Stat. 72; Pub. L. 109–58, title III, § 312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§ 3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109–58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87–454 inserted ''or gas distributing company'' after ''State commission'', and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, § 408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property

with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under

oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 21, 1938, ch. 556, §7, 52 Stat. 824; Feb. 7, 1942, ch. 49, 56 Stat. 83; July 25, 1947, ch. 333, 61 Stat. 459; Pub. L. 95–617, title VI, §608, Nov. 9, 1978, 92 Stat. 3173; Pub. L. 100–474, §2, Oct. 6, 1988, 102 Stat. 2302.)

AMENDMENTS

1988—Subsec. (f). Pub. L. 100–474 designated existing provisions as par. (1) and added par. (2).

1978—Subsec. (c). Pub. L. 95–617, §608(a), (b)(1), designated existing first paragraph as par. (1)(A) and existing second paragraph as par. (1)(B) and added par. (2).

Subsec. (e). Pub. L. 95–617, §608(b)(2), substituted ''subsection (c)(1)'' for ''subsection (c)''.

1947—Subsec. (h). Act July 25, 1947, added subsec. (h).

1942—Subsecs. (c) to (g). Act Feb. 7, 1942, struck out subsec. (c), and added new subsecs. (c) to (g).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–474, §3, Oct. 6, 1988, 102 Stat. 2302, provided that: ''The provisions of this Act [amending this section and enacting provisions set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988].''

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Energy and Commission, Commissioners, or other official in Federal Energy Regulatory Commission related to compliance with certificates of public convenience and necessity issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(d), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out under section 719e of this title. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of this title. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of this title.

§ 717g. Accounts; records; memoranda

(a) Rules and regulations for keeping and preserving accounts, records, etc.

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and

each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, §17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, §18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, §1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amend-

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to ''utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment,'' as specified by §1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in §1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in §1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under §1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material

may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, ''reasonably foreseeable'' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 21st day of March 2019, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system except for the following counsel, which I have served via U.S. Mail:

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